United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7463

To be argued by
NEAL M. GOLDMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

JAMES B. LANSING SOUND, INC.,
Plaintiff-Appellee,

against

ULTRALINEAR SOUND CORP., and EDDIE ANTAR,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFF-APPELLEE

SQUADRON, GARTENBERG, ELLENOFF & PLESENT
Attorneys for Plaintiff-Appellee
551 Fifth Avenue
New York, New York 10017
(212) 661-6500

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Counter-Statement of Issues Presented on Appeal

Whether, in the absence of clear error, this Court should set aside the District Court's findings of fact and substitute its own judgment as to the demeanor and credibility of witnesses for that of the District Court.

Counter-Statement of Case

This is an appeal from an order of the United States District Court for the Eastern District of New York, Hon. Orrin G. Judd, dated July 11, 1975 (Appendix 29a, hereinafter "App.") adjudging that Ultralinear Sound Corp. and Eddie Antar (the "appellants") were in contempt of a

final consent judgment entered on October 18, 1974 (App. 10a), which judgment enjoined appellants from offering to sell or selling products manufactured by James B. Lansing Sound, Inc. (the "appellee") at less than the minimum fair trade resale prices established by appellee, and punishing them for such contempt.

The District Court, after hearing complete oral testimony and argument and after considering all the papers submitted, specifically found that appellants had on at least two occasions offered to sell appellee's products at prices less than those specified by the injunction (App. 29a, 108a).

Counter-Statement of the Facts

On October 26, 1974, appellants were served with a copy of a final judgment, entered on October 18, 1974, permanently enjoining them from offering to sell or selling appellee's products at less than the minimum fair trade prices established by appellees therefor. Since appellants had consented to the final judgment entered by the trial court, they had full knowledge of its existence and terms (App. 10a), and, by their own admission, of the applicable fair trade prices (App. 91a). Indeed, they admitted being warned thereafter concerning violation of the terms of the injunction (App. 18a-20a, 81a).

At the hearing before the District Court on July 3, 1975, appellee established that appellants had persisted in their established course of conduct and were continuing to offer to sell appellee's products at prices which they knew to be less than the minimum fair trade prices for those products.

Frank Graziadei testified that he was a Fordham law student who was employed as a shopper for appellee (App. 34a). He further testified that on May 31, 1975, he visited the premises of one of appellants' stores with a friend (App. 35a) and was quoted a price of $475 for a pair of

appellee's Model L-100 speakers (App. 36a, 39a, 56a), a price well below the fair trade price in effect on that date (App. 25a, 78a).

Lawrence Fay testified that he was also employed as a shopper by appellee (App. 59a) and that on April 26, 1975, a Saturday, he went to the same location of appellants' operations where a price of $500 was quoted for a pair of appellee's Model L-100 speakers (App. 61a, 65a), and $300 for a pair of its Model L-36 speakers (App. 67a). The minimum fair trade law on April 26, 1975, was $594 for a pair of appellee's L-100 speakers and $396 for their L-36 speakers (App. 22a, 77a, 78a).

In appellants' defense, Eddy Antar testified on direct examination that appellants discounted only "demonstration models" (App. 86a), and that they "get full list price on JBL models that are new" (App. 88a-89a). In response to his own counsel's final question on direct examination, Mr. Antar said:

> Q. "Could you at any time ever have sold a new JBL speaker for below the fair trade price since the issuance of the injunction order?"
>
> A. "No. That's since last October? Right? No." (App. 89a-90a.)

Thus, although appellants never specifically denied either of the transactions testified to by appellee's witnesses (See, e.g., App. 99a and 102a), their witnesses generally denied ever quoting or selling appellee's products at prices below the minimum price (App. 89a-90a, 99a-100a, 101a, 102a).

On cross examination, however, although Mr. Antar stated that appellants had not sold very many new JBL products from October 1974 until the date of the hearing (App. 90a, 93a), and that appellants claimed to have had records to substantiate their denials of violative sales (App. 90a), no such records were produced (App. 90a).

ARGUMENT

POINT I

The findings of fact made by the District Court should not be set aside.

The sole issue tried to the District Court was an issue of fact: were the violative offers in fact made? (App. 26a-27a.) The District Court resolved that issue on the basis of oral testimony and found the facts as appellee alleged them.

The scope of appellate review of such factual determinations is extremely limited. Where, as here, the record discloses ample support for the factual findings of the trial court, it is beyond the scope of review to set those findings aside unless they are clearly erroneous, Rule 52(a) Fed. R. Civ. P., i.e., unless this Court, upon a review of all the evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). See also *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949).

Indeed, since the District Court found the facts primarily on the basis of the testimony of three witnesses, the scope of review of such findings is even narrower. The District Court personally observed the demeanor of the witnesses, which observations are unavailable to this Court and which are peculiarly within the province of the District Court. *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484 (2d Cir. 1952). As Judge Learned Hand said:

> [W]hatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon

whether they spoke the truth, the accepted rule is that they "must be treated as unassailable".

United States v. *Aluminum Co. of America,* 148 F. 2d 416, 433 (2d Cir. 1945).

In the case at bar, the District Court simply found that the witnesses for appellee, a law student and a college student, each of whom shopped one of appellants' stores, had testified truthfully that appellants' salesmen offered to sell them appellee's sound equipment at less than fair trade prices. (See App. 108a: "I see no reason to disbelieve the testimony of Mr. Graziadei or Mr. Fay".)

Appellants' desperate attempts below to discredit these witnesses and to controvert their testimony or to persuade the trial court that their veracity should be doubted clearly establish that the sole issue presented was the credibility of the testimony. Appellants' attempts in this Court to impugn the veracity of the witnesses against them, characterizing their affidavits as "false swearing" (Brief of Appellants, p. 1) and their testimony as "astonishing" (Brief of Appellants, p. 5) further reinforce this conclusion.

Having the opportunity to study the witnesses for both sides, the District Court concluded that the appellee's testimony was credible and that appellants' was not. [He even noted his conclusion that appellants attempted to "dodge" the law (App. 108a).] Since the testimony of appellee's witnesses is neither hopelessly incredible nor does it contradict any undisputed documentary evidence (except in one immaterial respect), *NLRB* v. *Dinion Coil Co., supra,* at 490, the findings based thereon must be accepted.

Appellants contend that the District Court could not have done what he clearly did do—believe appellee's witnesses—so that he must have based his ruling solely on the negative inference he drew from appellants' failure

to produce certain records (Brief of Appellants, p. 1 . It follows, appellants argue that since appellants had no duty to produce the records, the inference was improper and the order must be reversed. Self-evidently, the argument and the tortured logic it evidences is utterly specious. Clearly, the District Court had every reason to believe appellee's witnesses and properly drew a negative inference as one element in resolving the conflict in credibility.

Mr. Graziadei may have erred in his affidavit when he reported appellants' quote to him as being $470 (App. 46a). However, he credibly explained such error when he said that at the time he prepared his affidavit, he did not have his shopping form with him (App. 46a, 112a). Similarly, Mr. Fay, confused by his first experience on the witness stand, misspoke himself in testifying to a price he received from appellants (App. 61a, 66a, 67a). Surely, these trivial variances cannot ground a determination of legal incredibility, particularly when the witnesses corrected their testimony and testified consistently with their prior recorded statements (App. 112a, 115a).

Appellants' withholding or failure to produce important evidence within their peculiar control raises an inference that such evidence would have been unfavorable to appellants' cause. This Court has observed that the strongest unfavorable inferences may be drawn from such failure. *Tupman Thurlow Co., Inc.* v. *S. S. Cap. Castillo*, 490 F. 2d 302 (2d Cir. 1974).

The record below reveals that during direct examination appellants volunteered the information that they *never sold* appellee's new products at prices which were below the fair trade prices in violation of the injunction (App. 89a-90a). By so doing, appellants voluntarily took upon themselves the burden of coming forward and producing the documentation which was, by their own admission, within their control and which would support their claim (App. 90a-91a).

The District Court at that juncture recognized the significance of appellants' failure to bring sales records with them (App. 94a). Indeed, appellants opened the issue of their prior sales in order to negate appellee's claims of unlawful offers. Thus, such records would not only have been probative evidence, but would likely have disposed of the case:

> The Court: It seems to me Mr. Antar, that . . . with knowledge that there was contempt proceeding pending, the defendants have brought no sales records to show that they ever sold JBL speakers at fair trade prices . . . . (App. 107a.)

Having thus opened the door, appellants cannot now be heard to complain that the burden was improperly allocated to them because, having failed to come forward with available documentary proof, their claims of innocence were exposed, in the words their counsel used to characterize appellee's case, as "a lot of hot air" (App. 109a).

CONCLUSION

Appellee respectfully submits that the order of the District Court, based on findings which are sound and amply supported by the proof, should be affirmed.

Respectfully submitted,

SQUADRON, GARTENBERG, ELLENOFF & PLESENT
Attorneys for Plaintiff-Appellee
551 Fifth Avenue
New York, New York 10017
(212) 661-6500

Of Counsel:

NEAL M. GOLDMAN, Esq.
HARRIET N. COHEN, Esq.

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U.S. COURT OF APPEALS FOR THE SECOND CIRCUTI

LANSING SOUND

VS

ULTRALINEAR

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York, ss.:

HAROLD DUDSH being duly sworn deposes and says that he is agent for Squadron, Gartenberg, Ellenoff & Plesent, the attorney for the above named plaintiff-appellee, herein. That he is over 21 years of age, is not a party to the action and resides at 2346 Holland avenue BX, N.Y.

That on the 12th day of december, 1975 19 , he served the within brief of Pl-appellee

upon the attorneys for the parties and at the addresses as specified below

Solomon E. Antar, 2238 East 1st Stret, P.O. Box 212, Gravesend Stationm Brooklyn, NY 11223

by depositing ~~xkx~~ two copies

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 12th day of december, 1975, 19.....

Harold Dudash

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977